Filed 7/30/15 Kwong v. Alameda County Fairgrounds CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

EDWIN KWONG et al., **Plaintiffs and Appellants,** **v.** **ALAMEDA COUNTY FAIRGROUNDS et al.,** **Defendants and Respondents.**	**A140851** **(Alameda County Super. Ct. No. HG12651175)**

Edwin Kwong and Gui Corporation, doing business as Mega Production (appellants) sued Alameda County Fairgrounds (ACF), the Alameda County Agricultural Fair Association (ACAFA), and Rick Pickering (respondents) after ACAFA terminated an agreement granting appellants a license to hold a live music event at ACF. Appellants' suit alleged various causes of action, including breach of contract and federal civil rights violations. The trial court sustained respondents' demurrers to the original complaint and the first amended complaint (FAC) but granted appellants leave to amend. Appellants then filed a second amended complaint (SAC) to which respondents also demurred.

The trial court sustained respondents' demurrer to the SAC without leave to amend, concluding the Government Claims Act, Government Code section 810 et seq.[1] immunized respondents from appellants' causes of action for breach of contract and

[1] All undesignated statutory references are to the Government Code.

breach of the implied covenant of good faith and fair dealing. The trial court also ruled appellants had failed to allege sufficient facts to support their federal civil rights claims. It therefore dismissed the action with prejudice.

Appellants challenge the trial court's order, arguing chiefly that respondents enjoy no immunity for terminating the license. We conclude the trial court did not err, and we will therefore affirm its decision.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In June 2011, Kwong, acting on behalf of Mega Production, entered into a written contract (the Agreement) with ACAFA to produce an electronic music event at ACF on December 31, 2011. Appellants paid a total of $15,000 in fees and deposit to secure the location. According to appellants, the Agreement "created a term tenancy in land, and provided that ACAFA would grant [Mega Production] a License to enter into and use the fairgrounds[.]" After signing the Agreement, appellants obtained a business license from the City of Pleasanton and procured liability insurance. Appellants spent over $500,000 marketing the event and began selling tickets by November 2011.

On or about December 7, 2011, Dave Spiller, chief of the Pleasanton Police Department, issued a letter that described appellants' event as a " 'rave' " and declined to endorse it. Two days later, ACAFA threatened to cancel the event if appellants did not provide a safety plan. On December 13, 2011, Rick Pickering, ACAFA's president and chief executive officer, sent a letter to appellants requiring appellants to submit a security plan by noon on December 16. Appellants submitted a security plan. Respondents did not reject the security plan or identify any inadequacies in it. Appellants, meanwhile, continued to incur expenses associated with planning the event.

Although appellants had complied with all terms of the Agreement in planning the event, on December 16, 2011, Pickering sent appellants a letter cancelling it. The letter

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[2] "Inasmuch as all material facts pleaded in the complaint and those which arise by reasonable implication, but not conclusions of fact or law, are deemed admitted by the demurring party [citations], we derive our facts from the [SAC]." (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 797, fn. 4.)

cited various reasons for the cancellation, "including: 1) that the Fairgrounds is compelled to act in the best interest of public safety and therefore relies on the assessments of the Sheriff's Department and Police departments, both of which have concluded that the event cannot be held safely, 2) 'ever changing' representations made by various representatives regarding the event, 3) Recent advertising causing law enforcement professionals to determine that the event is targeting the 'rave culture,' as outlined in Police Chief S[p]iller's letters, 4) Lack of timely and satisfactory follow up on insurance requirements, and 5) potential liability impacts tied to recent State legislation, AB74 which states that a 'finding must be made that the event is in keeping with 'Community standards.' Chief S[p]iller's letter states that the event is not appropriate for the community and will overburden safety services for the Tri-Valley areas."

Mega Production then secured an alternate site in Tulare, California, paying over $66,000 in additional monies to secure and market that site, which is located several hundred miles away from the original venue. The event went forward without incident.

Appellants filed a claim against the County of Alameda on March 23, 2012. The county rejected the claim on May 10, 2012.

Appellants sued, and following successful demurrers to their initial complaint and the FAC, appellants filed the SAC, which is the operative pleading in this case. The SAC alleged six causes of action.[3] Respondents once again demurred to the complaint, and on December 17, 2013, the trial court sustained that demurrer without leave to amend. As to the claims for breach of contract and breach of the implied covenant of good faith and fair dealing, the court ruled respondents were immune under section 818.4. It sustained the demurrer with respect to the remaining claims because appellants had failed to allege sufficient facts supporting them. The trial court ordered the entire action dismissed with prejudice.

[3] Specifically, the SAC alleged causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, three claims under 42 United States Code section 1983 for alleged violations of appellants' constitutional rights, and a cause of action for conspiracy.

DISCUSSION

Appellants argue the trial court improperly concluded that section 818.4 confers immunity on respondents for their decision to terminate the license to use ACF. They also argue the court erred in sustaining the demurrer to their civil rights causes of action. Appellants further assert they stated a cause of action for fraud. We will address these arguments after setting forth our standard of review and disposing of the parties' procedural arguments.[4]

I. *Standard of Review*

A demurrer tests the legal sufficiency of the complaint. (*Satyadi v. West Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022, 1028 (*Satyadi*).) "In reviewing the superior court's order sustaining the demurrer, 'we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory[.]' [Citation.] While our focus is on the pleadings, '[r]elevant matters that are properly the subject of judicial notice may be treated as having been pled.' [Citation.] Even if the trial court has not ruled on a party's request for judicial notice, we may ourselves take judicial notice of appropriate matters. [Citation.]" (*Requa v. Regents of University of California* (2012) 213 Cal.App.4th 213, 223, fns. omitted.)

On appeal, we are not bound by the trial court's construction of the pleadings. (*Satyadi, supra*, 232 Cal.App.4th at p. 1028.) We give the complaint a reasonable interpretation and treat the demurrer as admitting all properly pleaded material facts. (*San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 425 (*San Mateo Union High School Dist.*).) Nevertheless, we do not assume the truth of contentions, deductions, or conclusions of law. We must affirm the judgment if any one of the grounds of demurrer is well taken. (*Ibid*.) " '[O]ur inquiry ends and

[4] Appellants have rendered our task much more difficult by failing to include either a table of contents or a table of authorities in their opening brief. (See Cal. Rules of Court, rule 8.204(a)(1)(A).) We remind counsel that we may strike noncompliant briefs. (Cal. Rules of Court, rule 8.204(e)(2)(B).)

reversal is required once we determine a complaint has stated a cause of action under any legal theory.' " (*Satyadi, supra,* 232 Cal.App.4th at p. 1028.)

" 'On appeal from a judgment of dismissal after a demurrer has been sustained without leave to amend, the plaintiff has the burden of proving error. [Citation.] "Because the trial court's determination is made as a matter of law, we review the ruling de novo." [Citation.]' " (*San Mateo Union High School Dist., supra,* 213 Cal.App.4th at p. 426.)

II. *Procedural Issues*

Both parties have raised procedural issues we must resolve before we turn to the merits. Initially, respondents question whether the order sustaining their demurrer is properly appealable. For their part, appellants argue the trial court erred in sustaining respondents' demurrer to causes of action in the SAC that had survived prior demurrers. As we explain, neither argument is well taken.

A. *The Trial Court's Order Sustaining the Demurrer Without Leave to Amend Is Deemed to Incorporate a Judgment of Dismissal.*

Respondents accurately observe that Kwong's notice of appeal purports to appeal from the "judgment" entered on December 18, 2013, sustaining their demurrer to the SAC. As respondents correctly point out, the record before us contains no copy of any judgment dismissing the action. Thus, the appeal appears to have been taken from the order sustaining respondents' demurrer to the SAC.

" 'Orders sustaining demurrers are not appealable.' [Citation.] But 'an appellate court may deem an order sustaining a demurrer to incorporate a judgment of dismissal.' " (*Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1019.) Because an order sustaining a demurrer to the entire complaint without leave to amend effectively terminates the action, we may treat it as an appealable order even in the absence of a separate order or judgment of dismissal. (*Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1590, fn. 4.) Here, the trial court's order states, "the entire action is DISMISSED WITH PREJUDICE" and thus effectively terminates the proceeding. (See *ibid.* [trial court's order sustaining demurrer without leave to amend also stated " 'the case is

dismissed' "].) In addition, while respondents raise the absence of a formal judgment in their brief, they do not argue the appeal should be dismissed on those grounds. We will therefore decide the case on the merits by treating the order sustaining respondents' demurrer as incorporating a judgment of dismissal. (*Zipperer v. County of Santa Clara, supra,* 133 Cal.App.4th at p. 1019.)

B. *The Trial Court's Order Overruling a Prior Demurrer Did Not Bar Respondents from Filing a Demurrer to the SAC.*

Appellants contend the trial court committed procedural error by sustaining respondents' demurrer on their claims for breach of contract and breach of the implied covenant and fair dealing. According to appellants, since the trial court had overruled respondents' demurrer to those causes of action as alleged in the first amended complaint, respondents' demurrer to the SAC was effectively an improper motion for reconsideration under Code of Civil Procedure section 1008.

In support, appellants rely on *Bennett v. Suncloud* (1997) 56 Cal.App.4th 91.[5] In that case, however, the trial court sustained a demurrer that was based on the very same grounds the defendant had asserted in three prior demurrers. (*Id*. at p. 96.) Here, in contrast, the trial court's rulings on the two demurrers were based on different grounds. The lower court overruled the demurrer to the first and second causes of action in the FAC because it found appellants had adequately pled performance of the contract with ACAFA. But it sustained the demurrer to those causes of action in the SAC on grounds of statutory immunity. (See *Berg & Berg Enterprises, LLC v. Boyle, supra,* 178

[5] Case law is split on whether a defendant may properly demur to a cause of action as to which a court has previously overruled a demurrer to a prior complaint. (Compare *Bennett v. Suncloud, supra,* 56 Cal.App.4th at p. 97, fn. omitted [trial court may not render new determination on the "viability of those claims unless some new facts or circumstances were brought to [its] attention"] with *Pacific States Enterprises, Inc. v. City of Coachella* (1993) 13 Cal.App.4th 1414, 1420, fn. 3 [objecting party may properly demur on grounds previously overruled in prior demurrer because the " 'interests of all parties are advanced by avoiding a trial and reversal for defect in pleadings' "]; accord, *Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 389, fn. 3; *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1036.)

Cal.App.4th at p. 1036, fn. 15 [noting trial court had overruled earlier demurrers without addressing ground on which it sustained subsequent demurrer].)

In any event, now that the matter is before us, as a reviewing court we may consider de novo whether the challenged claim states a cause of action. (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1508-1509; *Bennett v. Suncloud, supra,* 56 Cal.App.4th at p. 97.) An appellate court's role "entails review of the trial court's ruling, not its rationale. Thus, even if the trial court . . . were constrained by its prior rulings[, an appellate court is] not so constrained and [is] free to render an opinion based on the correct rule of law." (*Berg & Berg Enterprises, LLC v. Boyle, supra,* 178 Cal.App.4th at p. 1036.)

III. *Because the Parties Agree this Case Concerns a Licensing Decision, Section 818.4 Shields Respondents from Appellants' Claims for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing.*

Before analyzing the immunity issue, we note the parties agree on a number of significant points. They agree ACF is a public entity. In addition, the trial court ruled, and appellants' brief does not dispute, that pursuant to section 25905, ACAFA is ACF's authorized agent.[6] There is also no dispute that ACAFA operates and maintains ACF under a contract with Alameda County. Thus, for our purposes, respondents' status as public entities or employees is not in question. (See §§ 810.2, 811.2.)

The parties also agree this case involves the propriety of a *licensing* decision. Appellants do not contest respondents' fundamental claim that a licensing decision is at issue. Rather, appellants contend only that section 818.4 does not apply here because respondents were performing a ministerial, nondiscretionary duty in issuing the license. As appellants put it, they "seek[] to impose liability on [r]espondents not for failure to

[6] Section 25905 provides in pertinent part: "The board of supervisors may contract with a nonprofit corporation or association for the conducting of an agricultural fair, *as agent of the county,* for a period not exceeding five years. The contract may provide for the use, possession, and management of any public park or fairgrounds by the nonprofit corporation, *as agent of the county,* during the period of the contract." (Italics added.)

discharge a discretionary governmental function, but rather for failure to perform a mandatory duty which the county could not in its discretion ignore[.]"

With these facts in mind, we turn to the merits of the parties' immunity arguments.

A. *Appellants Fail to Show Respondents Were Under a Statutory Duty to Issue the License.*

Respondents argue appellants' causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing are barred by sections 818.4 and 820.2. The former section provides: "A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked."[7] (§ 818.4.) The latter section shields a public employee from liability "for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (§ 820.2.) Respondents contend these sections immunize them from liability for their discretionary refusal to grant appellants a license to use ACF for a music event.

In response, appellants contend section 818.4 does not apply here because respondents were under a ministerial, nondiscretionary duty to issue the license. According to appellants, this nondiscretionary duty arose out of what appellants refer to as "AB74."[8] Appellants seem to contend respondents failed to comply with this statute because they did not hold "a normally scheduled meeting . . . at least 30 days prior to the event date, [to] assess the threat of loss of life or harm to participants that the event poses . . . ." (§ 11000.10, subd. (a)(1).) Appellants claim respondents did not comply with these requirements, and therefore "they cannot hide behind immunity."

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[7] Another section specifically provides immunity to public employees for their licensing decisions. (See § 821.2.)

[8] "AB74" is a reference to the Concert and Music Festival Safety Act. (Stats. 2011, ch. 666, §§ 1, 3.) The portion of the legislation on which appellants rely is now codified at section 11000.10.

We may consider this argument even though it was not raised below. (*Brunius v. Parrish* (2005) 132 Cal.App.4th 838, 849-850.) Initially, we note appellants point to nothing in the SAC alleging noncompliance with the statute; the operative complaint is entirely silent on the matter. More fundamentally, even if respondents failed to comply with section 11000.10, appellants do not explain why that failure should necessarily deprive respondents of section 818.4 immunity for what the parties agree is a licensing decision. We may therefore deem the contention forfeited. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."].)

Even if the argument had been properly presented, however, we fail to see how the cited statute supports appellants' claims. Generally, licensing is a discretionary act. (E.g., *MacDonald v. State of California* (1991) 230 Cal.App.3d 319, 330 ["the predominant character of licensing is discretionary"].) We have held that where a licensing decision is discretionary, a public entity is immune from liability under section 818.4. (*West v. State of California* (1986) 181 Cal.App.3d 753, 760.) The immunity provided by section 818.4 is unavailable to a governmental entity only "when it is under a statutory obligation to grant or withhold a permit or approval or when the decision is a nondiscretionary, ministerial act." (*Inland Empire Health Plan v. Superior Court* (2003) 108 Cal.App.4th 588, 593.)

We see nothing in section 11000.10 obligating respondents to grant any permit or approval.[9] At most, the statute sets out criteria by which a state agency must assess

[9] The provision's terms do not mandate that state agencies approve licenses for events such as the one appellants proposed to hold. The statute's text appears to require state agencies to assess the threat of harm to participants posed by "an event with an expected attendance level over 10,000 participants on property that is either owned or operated by a state agency[.]" (§ 11000.10, subd. (a)(1).) That assessment is to be made pursuant to specified criteria. (§ 11000.10, subd. (a)(1)(A)-(F).) If the state agency determines "there is a strong probability that loss of life or harm to the participants could occur, then the state agency shall require the promoter to prepare an event action plan." (§ 11000.10,

possible dangers associated with events held on public property, and it requires agencies to obtain event action plans from event promoters in appropriate cases. Where a public agency or employee must determine whether particular legal criteria have been met before a license or permit is issued, the licensing or permitting decision is a discretionary one. (See, e.g., *Thompson v. City of Lake Elsinore* (1993) 18 Cal.App.4th 49, 57 [no mandatory duty to issue permit "even if a proposed application and plan meet all existing code and regulatory requirements"]; *Slagle Constr. Co. v. County of Contra Costa* (1977) 67 Cal.App.3d 559, 563-564 [county planning commission had no mandatory duty to issue building permit, even if applicant's subdivision map has been approved and applicant is not in violation of law].) Here, because appellants can point to no statute that *requires* respondents to issue them a license, respondents' decision is discretionary, and they are entitled to the protection of sections 818.4 and 821.2.[10] (See *Colome v. State Athletic Com.* (1996) 47 Cal.App.4th 1444, 1457.)

B. *Section 814 Does Not Permit Appellants to Circumvent the Immunity Provided by Section 818.4.*

In support of their claims, appellants raise another argument not made in their papers below. They rely on section 814 and contend the trial court incorrectly ignored governmental liability based on contract.[11] That section states: "Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee." Appellants argue their claims are contractual in nature, and respondents are not immune to such claims.

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subd. (a)(2).) The event action plan submitted by the event promoter must then address certain issues set forth in the statute. (§ 11000.10, subd. (a)(2)(A)-(D).)

[10] The cases upon which appellants rely can be distinguished on this basis. (See *Elson v. Public Utilities Commission* (1975) 51 Cal.App.3d 577, 582, 589 [Public Utilities Commission was under mandatory statutory duty to revoke license of common carrier operating without insurance]; *Elton v. County of Orange* (1970) 3 Cal.App.3d 1053, 1059 [§ 818.4 inapplicable because complaint not based on negligence in licensing of foster home but rather on county's failure to perform mandatory duty under state regulations].)

[11] Since there is nothing in the record before us indicating appellants ever presented this issue to the trial court, it is difficult to understand how the lower court can be said to have "ignored" it.

Respondents make two counterarguments. They first contend section 814 "cannot be applied in such a way as to circumvent either its own underlying legislative policy or that of another section in the Tort Claims Act." (*Schooler v. State of California* (2000) 85 Cal.App.4th 1004, 1013 [§ 814 cannot be used to avoid immunity provided by § 831.25]; accord, *Esparza v. County of Los Angeles* (2014) 224 Cal.App.4th 452, 460 [§ 814 may not be used to circumvent policy of § 818.2].) According to respondents, allowing appellants' breach of contract claim to proceed under section 814 would permit appellants to make an end run around the licensing immunity provided by section 818.4. Appellants, who have filed no reply brief, do not respond to this argument, and we may treat it as conceded. (*Campbell v. Ingram* (1918) 37 Cal.App. 728, 732 ["Since appellant has not deigned to reply to the argument of respondent, we have a right to assume that the former deems the argument of the latter unanswerable[.]"].) Moreover, while appellants contend their claims are contractual in nature, they do not dispute this case involves issuance of a license. Thus, they effectively concede they are seeking damages for respondents' licensing activities. So understood, it is difficult to see how their breach of contract claim would not circumvent the legislative policy underlying section 818.4. (*Schooler v. State of California, supra,* 85 Cal.App.4th at p. 1013.)

Respondents also point to a provision in the Agreement which states, "[ACAFA] may also terminate this Agreement without cause for any reason whatsoever." Although respondents do not elaborate on the matter, we assume they read this provision as a bar to any breach of contract action, since it appears to allow ACAFA to terminate the Agreement with appellants in its discretion. (Cf. *Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1364 (*Bionghi*) [integrated contract providing for termination upon 30 days notice allowed termination with or without cause].) Again, since appellants have filed no reply brief, they have not responded to this contention. Looking at the plain terms of the alleged contract, however, ACAFA has the authority to terminate the Agreement without cause or for any reason. It is difficult to see how appellants could successfully plead a breach of the Agreement in light of this provision. (See *San Mateo Union High School Dist., supra,* 213 Cal.App.4th at p. 440 [county's

demurrer to breach of contract claim properly sustained where plaintiffs could not properly allege breach].) Appellants have thus failed to meet their burden of showing reversible error with respect to their breach of contract claim. (*Id.* at p. 426.)

C. *Appellants Cannot State a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.*

The foregoing analysis also disposes of appellants' claim for breach of the implied covenant of good faith and fair dealing. Where, as here, the claim for breach of the implied covenant of good faith and fair dealing is based on the same acts and seeks the same damages as the claim for breach of contract, it does not survive in the absence of the contract claim.[12] (*Bionghi, supra,* 70 Cal.App.4th at p. 1370.) Furthermore, since it appears ACAFA was allowed to terminate the Agreement "without cause for any reason whatsoever," the termination was not a breach of the contract's terms and thus no claim for breach of the implied covenant of good faith and fair dealing will lie. (*Alameda County Flood Control & Water Conservation Dist. v. Department of Water Resources* (2013) 213 Cal.App.4th 1163, 1203 ["there is no bad faith when a party does that which is explicitly allowed by an agreement"].)

IV. *Appellants Have Forfeited Any Claim of Error Regarding Dismissal of their Federal Civil Rights Claims.*

The SAC's third, fourth, fifth, and sixth causes of action alleged claims under title 42 United States Code sections 1983 and 1985 for violations of various constitutional rights. The trial court sustained respondents' demurrer to these causes of action because appellants "failed to allege facts supporting these claims." (Code Civ. Proc., § 430.10, subds. (e), (f); see *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678 [in civil action for violation of constitutional rights, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"].)

In this court, appellants do not address the trial court's reasons for sustaining respondents' demurrer to these counts. Instead, they argue: (1) respondents were acting

[12] The SAC explicitly ties the two causes of action together when it alleges that certain of respondents' actions "breached the contract and implied covenant of good faith and fair dealing[.]"

under color of state law in cancelling the event; and (2) respondents are not entitled to Eleventh Amendment immunity. Respondents did not demur on either of these grounds, however, and they contend these issues are irrelevant to this appeal. We agree.

Although we review the trial court's ruling on the demurrer de novo, our review is nevertheless "limited to issues which have been adequately raised and supported in [appellants'] brief." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) Where, as here, nothing in appellants' brief identifies any error in the trial court's decision, we may deem the argument abandoned. (See *Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 205 (*Flores*) [appellant's brief set out many legal propositions and cited authority but failed to "relate them to the facts of this case or show how they apply to demonstrate error" in trial court's ruling on demurrer]; *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1503 [challenge to trial court's order denying reconsideration of order sustaining demurrer forfeited where party provided no legal authority and no argument identifying any legal error in the trial court's ruling].) Since we must presume the judgment appealed from is correct, and appellants' brief fails to demonstrate any error in the trial court's ruling, we must affirm it. (*Flores, supra,* 224 Cal.App.4th at p. 204.)

V. *Appellants Waived Any Error With Regard to their Fraud Claim by Filing the SAC.*

Finally, appellants contend their cause of action for fraud was properly pleaded. The SAC, however, contains no cause of action for fraud. Appellants included a fraud claim in their FAC, but after the trial court sustained respondents' demurrer to that cause of action with leave to amend, appellants omitted it from the SAC. Appellants waived any error with regard to their fraud cause of action when they filed a superseding complaint. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 76.) Because there is only one operative complaint in a civil action (*State Comp. Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1131), a reviewing court will not consider the allegations of a superseded pleading. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884.) We

therefore will not address appellants' arguments regarding their fraud claim, since no such claim was before the trial court.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.